EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Cung Le, Nathan Quarry, Jon Fitch, Brandon Vera, Luis Javier Vazquez, and Kyle Kingsbury, on behalf of themselves and all others similarly situated, Plaintiffs, v. Zuffa, LLC, d/b/a Ultimate Fighting Championship and UFC, Defendant.	No.: 2:15-cv-01045-RFB-BNW
Kajan Johnson, Clarence Dollaway, and Tristan Connelly, on behalf of themselves and all others similarly situated, Plaintiffs, vs. Zuffa, LLC, TKO Operating Company, LLC f/k/a Zuffa Parent LLC (d/b/a Ultimate Fighting Championship and UFC) and Endeavor Group Holdings, Inc., Defendants.	No.: 2:21-cv-1189-RFB BNW

DECLARATION OF PROFESSOR ERIC A. POSNER IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF THE SETTLEMENT IN BOTH ABOVE-CAPTIONED MATTERS

I. INTRODUCTION

1. I have been asked by the plaintiffs in the above-captioned cases to provide context for the proposed class settlement by explaining the litigation risks faced by plaintiffs when they filed their claim and the significance of the settlement for enforcement of the antitrust laws. My understanding is that the plaintiffs settled these cases for $335 million in addition to certain prospective relief relating to the challenged practices. Below, I explain that antitrust claims

against employers for anticompetitive behavior in labor markets are relatively rare and difficult in comparison to other types of antitrust claims, and that labor-side section 2 claims of this type have been vanishingly rare. As far as I have discovered in my research, *Le v. Zuffa* is the first such claim ever to survive summary judgment, reach class certification, or even survive a motion to dismiss. The settlement will encourage more plaintiffs to bring cases to enforce an important but neglected policy embodied in the antitrust laws—that of ensuring that labor markets, and not just product markets, are competitive.

II. QUALIFICATIONS

2. I am the Kirkland and Ellis Distinguished Service Professor at the University of Chicago Law School. Before joining the Chicago faculty in 1998, I taught at the University of Pennsylvania Law School. I was educated at Yale College and Harvard Law School.

3. I have extensive academic experience and expertise in antitrust law and its application to labor markets. I have taught classes, given lectures, and written frequently about this topic. In addition to numerous articles on antitrust in labor markets in academic journals, I published a book on the topic in 2021 entitled How Antitrust Failed Workers (Oxford University Press).

4. I worked on labor and antitrust issues while serving as Counsel to the Assistant Attorney General of the Antitrust Division in the Department of Justice from 2022 to 2023.

5. I have substantial practical experience in antitrust law. From 2010 to 2016, I was counsel at Boies, Schiller, and Flexner, where I participated in antitrust cases.[1] From 2018 to

[1] I recently learned that Boies, Schiller, and Flexner represented Zuffa in this matter during my final years as counsel to the firm. I did not play any role in that litigation and, indeed, I was unaware of the representation at the time.

2022 and from February 2024 to the present, I have been counsel at MoloLamken, where I have litigated antitrust cases. I am a member of the bar of the states of Illinois and Maryland.

6. I have testified or made presentations on the application of antitrust law to labor markets before the Committee on the Judiciary, Subcommittee on Antitrust, Commercial, and Administrative Law, U.S. House of Representatives; the Federal Trade Commission; the Department of Justice; the National Association of Attorneys General; and various practitioner and academic groups.

7. I am a member of the American Academy of Arts and Sciences and the Council of the American Law Institute.

8. My most recent curriculum vitae is appended to this report.

III. ANALYSIS

A. Background on Labor Antitrust

9. While the Supreme Court has recognized that antitrust law protects workers from anticompetitive behavior since the 1920s, "labor-side" antitrust cases or "labor antitrust" cases, as they are sometimes called, have been rare.[2] In *Anderson v. Shipowners Association*, the Court held that employees of ship transport companies could bring an antitrust claim against those companies for fixing wages and agreeing not to poach workers.[3] In 2021, in *NCAA v. Alston*, the Court held that student athletes may bring antitrust claims against universities that bought their

[2] I use the terms "labor-side antitrust" or "labor antitrust" to refer to antitrust cases in which employees or independent contractors allege that a firm has engaged in anticompetitive actions in a labor market in violation of the antitrust laws. To avoid confusion, I will use the term "worker" to refer to individuals who supply labor to a firm in return for compensation, regardless of whether they are formally classified as employees or independent contractors.

[3] *Anderson v. Shipowners Ass'n*, 272 U.S. 359 (1926).

labor.[4] Along the way, various lower courts also recognized labor-side antitrust claims.[5] But such cases have always been rare. One reason for the relative sparsity of such claims is that, historically, economists and antitrust experts have generally assumed that labor markets were competitive. In addition, labor advocates may have believed that unions should take the lead in protecting workers from abusive employment conditions.[6]

10. Developments over the last fifteen years have shattered these assumptions.

11. First, as employment data became more available and statistical methods improved, economists learned that labor markets are in fact often highly concentrated.[7] For example, one prominent study found that 60% of labor markets have HHIs greater than 2,500, and a quarter of labor markets have HHIs greater than 7,200—in the latter case, implying thousands of firms that employ more than 80% of the workers in a labor market.[8] Labor markets are also frequently burdened by employer-imposed restraints on labor market competition, including no-poach agreements and covenants not to compete.[9] Recent studies have found that hundreds of franchises used no-poach agreements to restrict mobility of their workers among

[4] *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141 (2021).

[5] See, e.g., *Todd v. Exxon Corp*., 275 F.3d 191 (2d Cir. 2001).

[6] ERIC A. POSNER, HOW ANTITRUST FAILED WORKERS (2021); Eric A. Posner, *The New Labor Antitrust*, ANTITRUST L.J. (forthcoming, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4575258.

[7] See, e.g., José Azar, Ioana Marinescu, & Marshall Steinbaum, *Labor Market Concentration*, 57 J. HUM. RES. S167 (2022); David Berger, Kyle Herkenhoff, & Simon Mongey, *Labor Market Power*, 112 AM. ECON. REV. 1147 (2022).

[8] *See* José Azar, Ioana Marinescu, Marshall Steinbaum, & Bledi Taska, *Concentration in US Labor Markets: Evidence from Online Vacancy Data*, 66 LABOR. ECON. 1018 (2020).

[9] See Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector*, 57 J. HUM. RES. S324 (2022); Evan Starr, *Consider This: Training, Wages, and the Enforceability of Covenants Not to Compete*, 72 ILR REV. 783 (2019).

franchisees.[10] Thousands of firms overuse covenants not to compete, which cover tens of millions of workers.[11]

12. Second, whether or not unions adequately protected workers, union membership has declined significantly since the 1950s.[12] This has been due to a variety of factors out of the control of workers, including globalization, technological changes, the advance of union-busting strategies, the growing practice of characterizing workers as "independent contractors," and changes in labor law.[13] As a result, the vast majority of workers lack union representation.

13. Recent economic research has found that labor market concentration, mergers, no-poach agreements, covenants not to compete, and related restraints on labor market competition are responsible for a range of economic harms—including lower wages, lower economic output, reduced worker mobility, worse job conditions, and reduced innovation.[14] Lower-income workers have been particularly hard-hit by employment restraints, which, in addition to being inefficient, transfer economic surplus from workers to usually wealthier shareholders and other

[10] See, e.g., Brian Callaci, Matthew Gibson, Sergio Pinto, Marshall Steinbaum, & Matthew Walsh, *The Effect of No-poaching Restrictions on Worker Earnings in Franchised Industries* (July 2023), ssrn.com/abstract=4155577.

[11] Natarajan Balasubramanian, Evan Starr, & Shotaro Yamaguchi, *Employment Restrictions on Resource Transferability and Value Appropriation from Employees* (2023), papers.ssrn.com/abstract=3814403.

[12] Anna Stansbury & Lawrence H. Summers, *The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy* (Nat'l Bureau of Econ. Rsch., Working Paper No. 27193, 2020).

[13] See *id.*; Posner, *supra* note 6.

[14] See, e.g., Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 111 AM. ECON. REV 397 (2021) (mergers); Mark K. Meiselbach & Matthew D. Eisenberg, Labor Market Concentration and Employee Health Benefits (unpub., 2023), ssrn.com/abstract=4499203 (impact on health benefits). Additional sources are discussed in Posner, *New Labor Antitrust*, *supra* note 6.

owners of capital.[15] While unions sometimes ameliorate these impacts, only six percent of private-sector employees are unionized.[16]

14. Taking note of these developments, the Department of Justice and the Federal Trade Commission ramped up enforcement of the antitrust laws in labor markets. They issued a Human Resources Guidance in 2016 that warned employers that no-poach agreements and other labor restraints were illegal and potentially criminal,[17] updated the Merger Guidelines in 2023 to include a section laying out their approach to evaluating the labor market effects of mergers,[18] began challenging mergers based on labor market effects,[19] and initiated or intervened in labor-side antitrust litigation against employers.[20] The Department of Justice also brought several criminal cases,[21] while the FTC recently issued a rule banning covenants not to compete and related anticompetitive employment restraints.[22]

15. While this activity has raised the profile of employer abuse in labor markets and spurred private litigation, labor antitrust cases remain rare. There are three reasons for this. First,

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[15] Ihsaan Bassier, Arindrajit Dube, & Suresh Naidu, *Monopsony in Movers: The Elasticity of Labor Supply to Firm Wage Policies*, 57 J. HUM. RES. S50 (2022) (finding that monopsonistic competition is widespread even in low-wage, high-turnover sectors).

[16] See Paul D. Romero & Julie M. Whittaker, *A Brief Examination of Union Membership Data*, Congressional Research Service Report No. R47596, June 16, 2023.

[17] U.S. DEP'T OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (2016).

[18] U.S. DEP'T OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES (2023).

[19] *United States v. Bertelsmann SE & Co. KGaA*, 646 F. Supp. 3d 1, 32 (D.D.C. 2022); *Fed. Trade Comm'n v. Kroger Co*., No. 3:2024cv00347 (D. Or. filed Feb. 26, 2024).

[20] See, e.g., *Prudential Sec.*, FTC No. 2210026 (2023); *United States v. Cargill Meat Solutions Corp*. et al., 2022 WL 3083615.

[21] See, e.g., *United States v. Jindal*, No. 4:20-cr-00358, 2021 WL 5578687 (E.D. Tex. 2021).

[22] FED. TRADE COMM'N, NON-COMPETE CLAUSE RULE, 89 FR 38342-01 (May 7, 2024).

there is relatively little precedent that lawyers can use to predict case outcomes so that they can provide guidance to clients and calculate the odds of success in litigation. Second, because employee compensation is relatively hidden as compared to the prices of goods and services, workers often do not know they are underpaid and lawyers have trouble obtaining evidence for class actions. Third, creating classes of workers is sometimes more complex than creating classes of consumers.[23]

16. The labor antitrust cases that have been brought by private plaintiffs have almost always involved section 1 of the Sherman Act. These are cases in which independent employers collude by fixing wages, agreeing not to poach one another's employees, and engaging in similar activities. Section 1 labor cases are easier to bring than section 2 cases against monopsonists because section 1 cases involve agreements among multiple firms and those agreements are often public and may be per se illegal. The various lawsuits brought against sports leagues for anticompetitive behavior, for example, have benefitted from the public nature of the rules that leagues use to restrain competition.[24]

17. The current case, *Le v. Zuffa*, is the first section 2 labor antitrust claim that has ever resulted in an opinion, as far as I know,[25] even though labor monopsony is extremely common. See ¶ 11, above.

[23] See Posner, *New Labor Antitrust*, *supra* note 6.

[24] *NCAA v. Alston*; *House v. Nat'l Collegiate Athletic Ass'n*, 545 F.3d 804 (N.D. Cal. 2021); *Tennessee v. Nat'l Collegiate Athletic Ass'n*, No. 324CV00033DCLCDCP, 2024 WL 464164 (E.D. Tenn. Feb. 6, 2024); *Smart v. NCAA*, No. 2:22-cv-02125 WBS KJN (E.D.Cal. 2023); *State of Ohio v. Nat'l Collegiate Athletic Ass'n*, No. 1:23-cv-00100 (N.D. W. Va. Dec. 7, 2023).

[25] Posner, *supra* note 6, at 11. I have reviewed and updated my searches of case law databases for this report.

18. By contrast, section 2 cases in product markets are relatively common. Several such cases are among the most important landmarks of antitrust law. Section 2 was the basis of the breakups of Standard Oil in 1911[26] and AT&T in 1982,[27] and the successful government lawsuit against Microsoft twenty years ago.[28] Section 2 cases have recently been brought against Meta, Google, Apple, and Amazon.[29]

19. The contrast between rare section 2 labor cases and common section 2 product-market cases underlines the pathbreaking nature of *Le v. Zuffa*. The achievement of the significant settlement in this case—involving a payment of $335 million plus prospective relief—will encourage victims of employer monopsony to bring meritorious antitrust lawsuits against employer monopsonies.

B. The *Le v. Zuffa* Settlement

20. The plaintiff class filed its initial complaint on December 16, 2014, almost ten years ago, well before the modern wave of labor antitrust cases.[30] The Court certified a class[31] and denied the defendant's motion for summary judgment.[32] After considerable investment of time, money, and effort, the parties settled on the eve of trial.

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[26] *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

[27] *United States v. AT&T*, 552 F. Supp. 131 (1982).

[28] *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

[29] *Fed. Trade Comm'n v. Meta Platforms Inc.*, 1:20-cv-03590, (D.D.C. 2020); *United States v. Google LLC*, 1:20-cv-03010 (D.D.C. 2020); *United States v. Google LLC*, No. 1:23-cv-00108 (E.D. Va. 2023); *United States v. Apple Inc.*, 2:24-cv-04055, (D.N.J. 2024); *Fed. Trade Comm'n. v. Amazon.com Inc*, 2:23-cv-01495 (W.D. Wash. 2023).

[30] *Le v. Zuffa, LLC*, No. 2:15-cv-01045-RFB-BNW, 2023 WL 5085064 (D. Nev. Aug. 9, 2023) at ECF No. 1.

[31] *Id*. at ECF No. 839 (certifying class).

[32] *Id*. at ECF No. 959 (denying summary judgment).

21. This Court held that plaintiffs properly alleged a section 2 violation of the antitrust laws and showed a genuine dispute of material fact.[33] The plaintiffs had alleged that the defendant had engaged in a variety of anticompetitive actions to achieve a monopsony over the market for Elite Professional Mixed Martial Arts Fighter services in the United States.

22. In addition to stating a valid claim and demonstrating that there were genuine disputes of material fact as to their allegations, the plaintiffs secured important judicial opinions that will help litigants and future courts adjudicate section 2 labor antitrust cases. As the first opinions in such a case, they provide valuable guidance to future courts and litigants for, among other things, labor market definition, identification of anticompetitive actions in labor markets, the use of data and statistical techniques by experts to determine compensation levels and shares for certain types of workers, and considerations for certifying a class of workers in a labor antitrust case.

23. The case will also provide valuable guidance for litigants and judges in other labor antitrust cases brought under section 1 of the Sherman Act, section 7 of the Clayton Act,[34] and other provisions of the antitrust laws. Many of the issues addressed by this Court, for example, labor market definition, remain a matter of contention in other areas of antitrust law, and the Court's discussion and resolution of these issues will help courts and litigants navigate the law in future litigation. Indeed, *Le v. Zuffa* was cited for its analysis of labor market definition in *United*

[33] *Id*.

[34] For example, adjudication of an important recent merger challenge brought by the FTC under section 7 of the Clayton Act will benefit from the opinions issued by this Court. That case involves allegations that the merger of two large grocery chains will produce anticompetitive effects in multiple labor markets. See *Federal Trade Comm'n, In the Matter of The Kroger Company and Albertsons Companies, Inc.*, Docket No. D-9428 (2024).

States v. Bertelsmann, the first case in which a court blocked a merger because of its impact on labor markets.[35]

III. CONCLUSION

24. Anticompetitive behavior by employers is widespread and labor market concentration is often extreme, but historically the antitrust laws have rarely been used to address these problems. Only in the last ten years has there been a concerted effort to remedy this deficiency. The plaintiffs' challenge to the defendant's labor monopsony in an important sports and entertainment market has played a pioneering role in this effort, particularly in showing how an employer with power in a labor market can be challenged under section 2 of the Sherman Act. The judicial opinions it produced and the settlement for the class members will spur other private plaintiffs to pursue meritorious claims in this important but neglected area of the law.

Executed this 13th of May, 2024 in Germantown, New York.

Eric A. Posner

[35] See *Bertelsmann*, 646 F. Supp. 3d at 32 (citing *Le v. Zuffa, LLC*, 216 F. Supp. 3d 1154, 1159, 1165–66 (D. Nev. 2016)).

Appendix to the Declaration of Professor Eric A. Posner in Support of Plaintiffs' Motion for Preliminary Approval of the Settlement

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Professional Experience

2013-present	Kirkland & Ellis Distinguished Service Professor of Law, University of Chicago
Fall 2016	Visiting Professor of Law, Columbia Law School
2003-2012	Kirkland & Ellis Professor of Law, University of Chicago
Fall 2008	Visiting Professor of Law, NYU Law School
1998-2003	Professor of Law, University of Chicago
1998	Professor of Law, University of Pennsylvania
Fall 1997	Visiting Assistant Professor of Law, University of Chicago
1993-1998	Assistant Professor of Law, University of Pennsylvania
1992-1993	Attorney Adviser, Office of Legal Counsel, U.S. Department of Justice
1991-1992	Law Clerk, Judge Stephen F. Williams, U.S. Court of Appeals, D.C. Circuit

Books

Law and Social Norms: Harvard University Press (2000)
Japanese edition (Bokutakusha, 2002)
Chinese edition (China University of Political Science and Law Publishing House, 2005)
Taiwanese edition (Angle Publishing Company, 2006)
South Asia edition (Universal Law Publishing Company, 2009)

Chicago Lectures in Law and Economics (editor): Foundation Press (2000)

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The Limits of International Law (with Jack Goldsmith): Oxford University Press (2005)
Chinese edition (Law Press of Beijing)
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Federal Trade Commission, Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues, January 9, 2020

Committee on the Judiciary, Subcommittee on Antitrust, Commercial, and Administrative Law, U.S. House of Representatives: Reviving Competition, Part 4: 21st Century Antitrust Reforms and the American Worker, September 28, 2021

Department of Justice and Federal Trade Commission Workshop on Draft Merger Guidelines, University of Chicago Law School, November 3, 2023

Education

Harvard Law School. J.D., magna cum laude, 1991

Yale University. B.A., M.A. in philosophy, summa cum laude, 1988

Professional Organizations

Maryland Bar Association (admitted 1991)

Illinois Bar Association (admitted 2018)

American Law and Economics Association (board member, various times)

American Law Institute

Grants, Fellowships, and Awards

John M. Olin fellowship, University of Southern California (3/95)

University Research Foundation grant, University of Pennsylvania (6/96)

Olin Fellow, University of Virginia Law School (9/02)

Simon Visiting Scholar, Florida State University College of Law (3/18/04)

Fellow, American Academy of Arts and Sciences (elected 2010)

Sloan Grant for Conference on Benefit-Cost Analysis and Financial Regulation (2013) (with Glen Weyl)

Economist Book of the Year, for *Radical Markets* (2018)

Financial Times Book of the Year, for *Last Resort* (2018)

Bloomberg 50, for *Radical Markets* (2018)

Antitrust Writing Award, for Antitrust Remedies for Labor Market Power (2019)

American Antitrust Institute Jerry S. Cohen Memorial Fund Writing Award, for Antitrust Remedies for Labor Market Power (2019)

Lawdragon 500 Leading Lawyers in America (2019, 2020)

Teaching

Contracts; Secured Transactions; Bankruptcy; Corporate Reorganization; Seminar on Contract Theory; Seminar on Game Theory and the Law; Employment and Labor Law; Public International Law; International Human Rights Law; Foreign Relations Law; International Law Workshop; European Union Law; Seminar on the Financial Crisis of 2008-2009; Banking Law; Financial Regulation; Seminar on the Federal Reserve Board; Seminar on Executive Power; Seminar on Originalism and Its Critics; Corporate Finance

Other Professional Activities

Counsel to the Assistant Attorney General, Antitrust Division, Department of Justice (2022-2023)

Counsel, MoloLamken (2018-2021)

Counsel, Boies, Schiller & Flexner (2010-2016)

Cofounder and editor, New Rambler Review (2015-2017)

Member (elected 2014), Council Member (elected 2021); American Law Institute

Columnist, Slate Magazine (2012-2016)

Editor, Journal of Legal Studies (1998-2010)

Adviser, Restatement (Third) of Restitution, American Law Institute

Referee for Journal of Law and Economics, Journal of Economic Literature, Oxford University Press, Harvard University Press, Edward Elgar, Quarterly Journal of Economics, National Science Foundation, Law and Social Inquiry, American Economic Review, Journal of Law, Economics, & Organization, American Law and Economics Review, International Review of Law and Economics, American Journal of Political Science, Law and Society Review, Journal of Policy Analysis and Management, Journal of the European Economics Association, Health Affairs, University of Chicago Press, Canada Council for the Arts, World Politics, Supreme Court Economic Review, Law and Philosophy, Ethics and International Affairs, Institute of Medicine, Israel Science Foundation, Conflict Management and Peace Science, Smith Richardson Foundation, Yale University Press, Hart Publishing, Journal of Peace Research, British Journal of Political Science, National Academy of Sciences, Social Theory and Practice, Politics, Philosophy and Economics, Journal of Global Ethics, Climate Policy, Political Science Quarterly, Journal of Benefit-Cost Analysis, Journal of Legal Analysis, European Journal of International Law

Member, Editorial Board, Law & Social Inquiry (2000-2001)

Member, Board of Directors, American Law and Economics Association (2000-2003; 2013-2016)

Member, Board of University Publications, University of Chicago (2001-2004)

Member, Editorial Board, Review of Law and Economics (2004-)

Member, Oxford University Press Legal Education Advisory Board (2006-)

Member, Editorial Board, Journal of Benefit-Cost Analysis (2009-)

Short-Term Consultant, World Bank (2007)

Participant in Simulated Canada-United States Negotiation Over the Northwest Passage, sponsored by ArcticNet (Ottawa, February 2008)

Member, Faculty Steering Committee, Milton Friedman Institute (2008-2010)

Member, International Advisory Board, the Centre for Law, Economics and Society, University College London (2013-)

Member, Editorial Board, Economic Analysis of Law Review (2014-)

Sympatic Inc., Advisory Board (2019-)

Member, Committee on International Relations, University of Chicago (2003-)